

Dixon v Afternoon Delight Fifth Ave. Assoc., LLC

2019 NY Slip Op 31621(U)

June 7, 2019

Supreme Court, New York County

Docket Number: 150975/2017

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART

Justice

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WILLIAM DIXON,

Plaintiff,

- v -

AFTERNOON DELIGHT FIFTH AVENUE ASSOCIATES,
LLC, MARY CASTILLO, FIFTH AVENUE DELI-MART, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 90, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112

were read on this motion to/for AMEND CAPTION/PLEADINGS/DISCOVERY

Upon the foregoing documents and oral argument, the Decision/Order of the Court is as follows:

Defendant, AFTERNOON DELIGHT FIFTH AVENUE ASSOCIATES, LLC, ("Afternoon Delight") pursuant to CPLR 3124 and 3101, requests for this Court to issue an order compelling defendant the CITY OF NEW YORK (the "City") to provide certain demanded New York City Department of Environmental Protection ("DEP") and other records in response to Defendant's discovery demands. Co-defendant MARY CASTILLO a/k/a MARY CASTILLO PIMENTAL, FIFTH AVENUE DELI-MART, INC. (hereinafter "Castillo") has submitted an affidavit in support of this motion.1 The City opposes this motion. The Plaintiff has taken no position. For the reasons set forth below, this Court grants the Discovery motion, however, discovery will be limited to the parameters discussed below.2

Background

1 The Court thanks Daniel Rabbani for his assistance in this matter.

2 The motion also sought for Afternoon Delight to be permitted to amend its pleadings. This part of the motion was unopposed and it has been previously dealt with in an Interim Decision and Order, which is undisturbed by the instant decision on the discovery matters.

On August 25, 2016, Plaintiff was exiting Fifth Avenue Deli Mart (1318 5th Ave, New York, NY) at around noon. Plaintiff took 3 to 4 steps on the sidewalk outside the deli and fell. The accident was alleged to be caused by a defective condition, a broken collapsed sidewalk.

The defect in the sidewalk was approximately six feet long by four feet wide and four to eight inches deep and starting approximately 20 feet south of the southwest corner of the intersection of West 11th Street and Fifth Avenue and in front of the Fifth Avenue Deli Mart. There was a manhole Plaintiff estimated to be approximately four feet from the area where his accident occurred. There are photos provided in the record that show both the alleged defect and the manhole cover. The City of New York does not dispute that the manhole is the responsibility of the City of New York.

Discovery Standard Pertaining to Post-Accident Repairs

CPLR 3101[a] states that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof".

Generally, evidence in a negligence action is neither admissible nor discoverable when it comes to motions to compel post-accident repair records. *Hinton v City of New York*, 73 AD3d 407, 901 N.Y.S.2d 21 [1st Dept 2010], *lv denied* 15 N.Y.3d 715, 940 N.E.2d 922, 915 N.Y.S.2d 216, 2010 NY Slip Op 90741, 2010 WL 5110085.

The two exceptions to the general rule exist when (1) when there is an issue of control or (2) when plaintiff has alleged a defect in manufacture. *Fernandez v Higdon El. Co.*, 220 AD2d 293, 632 N.Y.S.2d 546 (1st Dep't 1995).

Liability for Negligent Sidewalk Maintenance

Administrative Code §7-210 generally places liability for injuries due to negligent sidewalk maintenance on the abutting property owners.

However, "New York Rules & Regulations, Title 34, Department of Transportation, Chapter 2, Highway Rules," 34 RCNY 2-07 states that the duty of maintenance and repair of a sidewalk manhole or grate is placed upon the owner of that manhole or grate. *Storper v. Kobe Club*, 76 AD3d 426, 427 (1st Dep't 2010).

Discussion

There is a dispute over who controlled or maintained the area of the sidewalk that is the subject of this case. As such, post-accident repairs of the sewer narrowly tailored could shed light on who controlled the area of the sidewalk where the accident occurred.

Afternoon Delight, at oral argument on this motion, stated that they were unable to make repairs after making consistent 311 calls because they did not have control over that area of the sidewalk where the defect occurred. By requiring the City to turn over particularized information post-accident in relation to the sewer, it could speak to whether the City of New York had control over that area of the sidewalk. In addition, Afternoon Delight, in support of their motion makes note of the results of a Freedom of Information Law request that shows that less than one month following this accident, there was an apparent cave-in on the sidewalk regarding the sewer manhole cover in question. There are two work order numbers identified, WO#186221972 and 843480983.

In *Gordon v. City of New York*, 245 AD2d 184, 666 N.Y.S.2d 186 (1st Dep't 1997), this Court held that post-accident repair estimates were discoverable because of their pertinence to determining who controlled or maintained the sidewalk where Plaintiff's injury occurred. This Court reasoned that even if held inadmissible at trial since the requested repair estimates were post-accident, they could still serve to illuminate who maintained and controlled the area where Plaintiff was injured. *id. See, Olivia v Gouze*, 285 App Div 762, 765 (1st Dep't), *aff'd* 1 NY2d 811 (1956).

Afternoon Delight discovery demand is simply too broad in scope and the only relevance pertaining to who maintained or controlled the area of the sidewalk that is in question would be information related to the sewer. However, Afternoon Delight has made a particularized showing regarding 2 work orders, #186221972 and 843480983, that may very well provide relevant information regarding control of the sidewalk surface, but also as to items under the surface that might have caused the defect in question.

Accordingly, Afternoon Delight's discovery motion will be granted, however, it will be limited to only work orders, reports, analyses, diagrams and other similar type written information maintained by the

City of New York with respect to the work orders listed above. This Court otherwise feels that the discovery provided to date by the City is sufficient based on the record before the Court. It is therefore

ORDERED that Defendant AFTERNOON DELIGHT FIFTH AVENUE ASSOCIATES, LLC motion compelling Defendant THE CITY OF NEW YORK to provide certain demanded records in response to Defendant's discovery demands is granted to the extent that the CITY OF NEW YORK is ordered to provide all work orders, reports, analyses, diagrams and other similar type written information maintained by THE CITY OF NEW YORK with respect to the work orders #186221972 and 843480983, within sixty days of the issuance of this Order, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

6/7/2019
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

LYLE E. FRANK, J.S.C.

**HON. LYLE E. FRANK
J.S.C.**